1966

Don Barton v. John Jensen : Respondent's Brief

IN THE SUPREME COURT
of the
STATE OF UTAH

DON BARTON,

Plantiff-Respondent,

-vs-

Case No. 10722

JOHN JENSEN,

Defendant-Appellant.

Brief of Respondent

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PRELIMINARY STATEMENT

The parties will be referred to as they appeared in the lower court.

STATEMENT OF KIND OF CASE

This is an action by plaintiff for personal injuries and property damages arising out of a motor vehicle collision involving vehicles driven by the parties.

DISPOSITION IN THE LOWER COURT

This case was tried to a jury. The court submitted a special verdict consisting of six "propositions". After deliberation the jury returned answers to the propositions in favor of the plaintiff and against the defendant. The Trial Court, after polling the jurors entered a Judgment on the verdict in conformity with the jurors anwsers to proposition number 6 for a total sum of $4,389.00 (See Polling of Jury as regards to Proposition Number 3 — page 7).

RELIEF SOUGHT ON APPEAL

Defendant appellant seeks reversal of the Judgment on the verdict rendered by the lower court. Plaintiff-respondent contends that the trial court's ruling should be sustained.

STATEMENT OF FACTS

On September 23, 1965 the Plaintiff-respondent was driving his custom built International Grain Truck loaded with 8,000 pounds of grain in a Southerly direction on Utah Highway 11, south of Chester, Sanpete County, Utah approximately 35 miles per hour. The defendant-appellant's pickup truck was travelling in the same direction at a slower speed ahead of the plaintiff. It was 3:30 p. m. in the afternoon, the day was clear and the road dry. The plaintiff signalled by lights his intention to pass and started to pass in the clear opposite lane of traffic. The defendant without warning or signalling turned his motor vehicle diagonally left acrosss the said highway to enter a private field. Plaintiff tried to avoid collision, but it was too late and the two vehicles collided; the plaintiff's vehicle rolled over, was damaged, and the plaintiff was injured. The grain was scattered all over the road

There were no homes in the area. (T. 6) Field pastures were on both sides of the road. There were no intersections, but there were some private gateways to the fields. (T. 7) The speed limit at the place of collision was 60 miles per hour. (T. 8) Defendant gave no signal to turn, either by light or arm. Plaintiff immediately hit his brakes and turned to the right to try to avoid the collision. There was a squealing noise, a crash and the plaintiff truck went out of control. (T. 9)

Immediately after the collision, Plaintiff asked defendant, "Don't you ever signal when you turn?" Defendant said, "I thought you was further back:" (T. 11) Defendant Jensen also stated, "Don't worry about your truck, it will be taken care of." (T. 18) Mr. Jensen also told a witness, Mr. LaVar Hill who came by after the accident (T. 96)

> "I said, (LaVar Hill testifying)
> "What happened?"
>
> He said, (Mr. Jensen, the defendant)
> "Well I was watching the truck coming behind me, and my guess in distance, I thought he was further back than he was, and when I went to turn, he bumped me."

The case was tried to a Jury who were submitted a Special Verdict of Six propositions (R. 46). In proposition No. 6 the Jury itemized the damages plaintiff suffered as a prominate result of the collision.

It is concerning one of the Court's instructions and the special verdict and propositions, and the court's polling the Jury that the Defendant relies upon in this appeal. The trial itself and the evidence submitted is clearly in conformity with plaintiff's pleadings, and the evidence warrants the

finding of a verdict for plaintiff in the amounts stated of

Medical expenses & X-Ray	$ 54.00
For cost of Drugs	66.00
Truck Damage	715.00
Damage to custom built attachment	763.00
For loss of Turkey Feed (gram)	221.00
General Damages - Including loss of earnings	2000.00
Loss of use of truck	570.00
Total	$4389.00

The verdict as above found was signed by six of eight jurors.

ARGUMENT

POINT ONE

THE VERDICT AS RETURNED BY THE JURY, AS POLLED BY THE COURT, AND AS SIGNED BY 6 JURORS IS IN FAVOR OF THE PLAINTIFF.

When the jury returned at 6:00 P. M. (p.122) the answers to the Verdict were not complete and it was obvious to the court and counsel the verdict was ambiguous. The court sent the Jury back to clear up the inconsistency. (p 123) The Court pointed out that the answers were inconsistent. The Plaintiff could not be contributary negligent in not seeing a signal Defendant had been negligent in not giving. (T. 122)

The foreman indicated they would consider it again and the Jury returned to the Jury room.

At 7:30 the Jury returned with their verdict. It was

obvious the Jury knew their decision but did not understand the Court in the proposition No. 3 about Proximate Cause. The Court then polled the jury and after asking each juror for his answer, a verdict was rendered in favor of the plaintiff for the amount of damages set forth by the jury in its verdict.

The amount of damages had already been in the verdict before the polling and the verdict had already been signed. It was obvious by reading all the questions and answers together that the jury intended the plaintiff to recover in the amount they found.

It is the defendant's contention in this case that the Court should have accepted the inconsistent verdict, which the court refused to do.

The principle is general (53 Am. Jur. Section 1099) that when a jury returns an insensible or inconsistent verdict, or one that is not responsive to the issues submitted, or is in disregard of the instructions of the court, they may be directed by the court to reconsider it and bring back a proper verdict. This may be done with or without consent of counsel. It should be done whether asked or not.

As to special verdicts or to special findings the practice is really only an application of the settled rule that until the verdict has been filed or the jury has been discharged as unable to agree, their connection with the case has not come to an end. Even though polled, they may be sent back, after having announced their verdict, if the trial judge is not satisfied they have given the case proper consideration.

When the jurors are sent back to reconsider their verdict, they may amend it not only by correcting a mistake in

form, or by making plain that which was obscure. They may alter it in substance, if they so agree. The case is still in their hands on their second retirement, and they are not bound by their former action, they are at liberty to review the case and bring in an entirely new verdict. (Grant vs. State — Florida — 14 S 757 - 23 LRA 723.)

While it is clear that the trial judge may send the jury back to the consultation room for the purpose of correcting their findings as to matters of informality and uncertainty. and where the issue has not been passed upon by them, yet the Judge must not throw the weight of his influence into the deliberation of the jury as to matters exclusively within their province.

In this case, there was nothing said or done by the Judge in any of his actions, statements or questions which would in any way have indicated that the Jury should find one way or the other. His statements were strictly for the purpose of obtaining from the jury their verdict.

In 53 Am. Jur. Section 1082, it states the court may decline to receive a special verdict, the findings of which are inconsistent and manifestly made under a misapprehension of the instructions, and after explaining the instructions previously given, may direct the jury to retire for further consultation.

Section 1063 of 53 Am. Jur. states that — "A Special Verdict as distinguished from the General Verdict is one in which the jury finds all of the facts of the case, and refers the decisions of the cause upon those facts to the court. The purpose of a Special Verdict is to furnish the basis of the Judgment to be rendered."

Section 1015 of 53 Am. Jur. states that

In polling a Jury each juror must be questioned individually, and it is a reversible error for the court, when a poll is demanded to propound questions to the jurors collectively, instead of individually.

In the present case the court on request of counsel (the request does not appear on the record but it was made in open court) polled the jury on the findings for the direct purpose of making sure that the jurors understood the answers to the propositions. Six of the eight jurors answered that the Defendant's negligence was the proximate cause of the collision —

> (T.129) "THE COURT: They are holding he did not give an adequate signal.
>
> PROPOSITION No. 3
>
> Was this failure to give an adequate signal a proximate cause of the collision
>
> Q Mr. Nell?
> A Yes.
> Q Mr. Childs?
> A Yes.
> Q Mr. Moss?
> A Yes.
> Q Mrs. Black?
> A Yes.
> Q Was his failure to give an adequate signal a proximate cause of the collision?
> A Yes.
>
> THE COURT: Your answer is what?
> MRS. BLACK: Yes.
> THE COURT: Q Mr. Kenner?

A Yes.

Q Mr. Anderson, was his failure to give an adequate signal as you have found, a proximate cause of the collision?

A Yes."

After the polling was completed the court entered judgment on the verdict.

In all the polling there was only one juror that indicated confusion, and as soon as he understood what the court was asking answered the question in conformity with the prior written verdict.

Rule 47 (r) URCP — provides that if a verdict as rendered is informal or insufficient, it may be corrected by the Jury under the advice of the Court, or the jury may be sent out again.

In this case the court on its own motion determined the first answers were inconsistent and instructed the Jury in conformity with Rule 47 (r) and 49 (b) to return to the Jury Room and make a consistent verdict. This the jury did and the latter polling showed conclusively the verdict of the Jury.

The defendant contends that the court misled the Jury — even going so far as to say that the statement of the Judge, "Don't overlook the instructions that the verdict is to be signed at the end" was misleading.

The court's written instructions stated the verdict was to be signed. For counsel to now say that the oral statement caused their confusion would even argue with Rule 49 (b) which requires every verdict to be in writing signed by the

foreman. Obviously this statement by the Judge was not improper.

Our Rules of Civil Procedure Rule 47 (r) recognize that there may be times when a verdict is not sufficient and it may be corrected under advice of the courts, or the jury may be sent out again.

All communication between the trial judge and jury took place in open court in the presence of the parties and their counsel. It is clear by record there was no deliberation by the Jury in open court and it is clear by the answers to Proposition No. 3, set forth on record that the Jury held that the Defendants negligence was the proximate cause of the collision.

POINT TWO

THE POLLING OF JURY WAS NOT REVERSIBLE ERROR

Rule 47 (g) URCP provides the verdict must be in writing, signed by the foreman, and that either side may require the jury to be polled, which shall be done by the court or clerk asking each juror if it is his verdict. If upon such inquiry or polling there is a sufficient number of jurors agreeing the verdict is complete.

In this case the verdict as rendered set forth specifically the damages found to have been suffered by Plaintiff. Because of the answer to Proposition 3 the court polled the Jury for their answers.

There was no deliberating by the Jury on the polling when the Judge asked the questions.

Defendant in his brief relies upon two cases, neither

of which is applicable here.

In Carma-vs-Albertsen: 16 Ut2 145, 377 Pac.2 67, a slip and fall case, the verdict was not finished when the Jury was brought to the courtroom, they then filled it in, discussed it and then signed it.

In our case the verdict was completed, signed and the polling took place because of the obvious mistake of the answer to Proposition number 3. On the polling, the Jury's answers showed they found the proximate cause of the collision was the defendants negligence.

Defendant further relies upon Johnson-vs-Maynard: 9 UT2 268, 342 Pac. 2nd 884, where the Judge went into the Jury room to advise the Jury on a point of law in the absence of and without the consent of the counsel.

Obviously this is not our present case. Both counsel were present and the polling only took place after the verdict was brought in properly signed by 6 of the 8 Jurors with specific findings on amount of damages to be awarded.

In 71 ALR2, Section 2, p643 concerned with Polling Jury in Civil Cases it states:

The object of polling a Jury is to give each juror an opportunity to declare his judgment in open court, to enable the Jury to avail themselves of the Locus Poenitenitiae and to correct a verdict which they have mistaken, or about which, upon further reflection, they have doubt, and to ascertain with certainty that each juror approves of the verdict as announced and assents thereto at the time of polling, and that no one has been forced or induced to agree to a verdict to which he does not actually assent. It has also been declared that "polling the jury is but a means of obtaining the

sence, in open court, of each individual juror, as to the correctness of the verdict rendered, and is the most generally recognized means of ascertaining whether the jurors are unanimous in their decision.

The trial courts discretion in respect to polling the jury is subject to review by the appellate court, but will not be interferred with unless it is clearly erroneous. (Hillsdale -vs-Hi Speed Co. Mich Case 47 N. W 2nd 652).

The method of conducting the polling is within the discretion of the Judge.

In asking questions the Judge should not interrogate a juror in regard to reasons for his conclusion. But where the jurors response is questionable further interrogation for the purpose of ascertaining definitely whether he does or does not assent to the verdict is permissable (Dixon-vs-Archer - Tenn. Case — 291 SW2nd 603).

Where special interrogatories are submitted to jury a polling as to the findings thereon or answers thereto has in many instances been held proper or at least not prejudicial, (91 ALR2 p 662).

The exact form of the question is immaterial so long as it is directed merely to ascertaining whether or not he assents to the verdict as announced.

The court may permit a juror to correct or explain a response which, due to mistake, inadvertance, or misunderstanding, varies from the verdict as announced, or is ambiguous. (Andersen-vs-Penn Hall Co. 47F. Supp 691, Hillary vs. Earle Restaurant, Inc., 109 F Supp 829, Earl-vs- Times Mirror Co. Calif. 196 Pac. 57.)

The mere irregularity in polling has generally been held harmless, so as not to warrant or require the granting of a new trial or the reversal of a judgment rendered on the verdict. (71 ALR2 57).

In the polling this court conducted it is clear that the jury did not understand the meaning of Proposition No. 3.

The polling brought out definitely that 6 of the 8 jurors were answering question 3, "yes" that the Defendants negligence was the proximate cause of the collision.

The only purpose of the "Propositions" was to advise the court and this the polling did and the Judge correctly rendered judgment on the verdict for the Plaintiff in the amounts the Jury found and signed.

RULE 49, URCP provides under Special verdicts and

The court under our Rule for Special Verdict shall give to the Jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the Jury to make its finding upon each issue.

In the present case the verdict as reached together with the polling as to the proximate cause found specifically all the facts essential for the determination of the cause.

POINT THREE

THE COURTS FAILURE TO GIVE DEFENDANTS REQUESTED INSTRUCTION CONCERNING SOUNDING OF HORN WAS NOT ERROR.

The court properly instructed in No. 9-J

"There is no duty on the driver of an automobile to

sound the horn upon his intending to pass another vehicle."

It further instructed in 9 (b) the following:

"It was the duty of the driver of a car to use reasonable care under the circumstances in driving his car to avoid danger to himself and others and to observe and be aware of the condition of the highway, the traffic thereon, and other existing conditions; in that regard, he was obliged to observe due care in respect to:

(a) using reasonable care to keep a lookout for other vehicles or other conditions reasonably to be anticipated.

(b) not to attempt to pass another vehicle until he makes observation and ascertains that this can be done with reasonable safety under the circumstances.

You will note that the person whose conduct we set up as a standard is not the extraordinarily cautious individual, nor the exceptionally skillful one, but a person of reasonable and ordinary purdence. While exceptional caution and skill are to be admired and encouraged, the law does not demand them as a general standard of conduct."

Read together these instructions properly set forth the law. Plaintiff contends the Jury was not misled by these instructions.

Failure to give a warning signal does not constitute negligence when there is no apparent necessity for such a warning. (Nielson -vs- Lott, 81 Utah 265, 17 P2d 272)

In our case the Plaintiff was following a vehicle going slow down a main highway, he started to pass within the speed limit when without warning the vehicle turned left in front of the Defendant's vehicle to enter a private roadway in an open field. Under these circumstances there was no duty to sound his horn. To require a horn signal would be in conflict with 41-6-146 UCA 1953. It would have the effect of requiring a horn signal in the passing of every vehicle on these open farming areas.

The correctness of an instruction is ordinarily determined by the test of whether the rule of substantive law therein stated is correct or incorrect.

The court should not give undue prominence to the theory of one side or the other. If this issue of horn sounding had been singled out in any further way as the defendant requested the jury may have been misled into believing it was the controlling issue, which it wasn't. (53 Am. Jur. 568-Trial)

If the instructions considered as a whole fairly present the issues to the jury and state the governing law, error in individual instructions may be disregarded as harmless, and where statements of law contained in instruction are substantially correct they will not be condemned as prejudicial errors unless they tend to mislead the jury. (5 Am. Jur. 2nd 810, Appeal and Error)

Prejudice cannot be inferred on appeal from the fact that some of the instruction given by a trial court could have been drawn more precisely.

SUMMARY

The courts instructions clearly set forth the law, the jury verdict as determined after polling by the court properly indicated that the jury found in favor of the plaintiff and against the defendant and the court properly entered judgment on the verdict in favor of the plaintiff.

Respectfully submitted,

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